80-331

No. 70-3372

SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

ALLEN G. HICKS and
CLAUDETTE HICKS

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

Petition for a Writ of Certiorari
to the United States Court of Appeals
Fifth Circuit and
Motion To Vacate Judgments Below

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In the

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October term, 1979

No. 70-3372

Allen G. Hicks and
Claudette Hicks

Petitioners

v.

Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT AND MOTION TO VACATE JUDGMENTS BELOW

The Petitioner, Allen G. Hicks, prays that a writ of certiorari issue to review the opinion and judgment of the U. S. Court of Appeals, 5th Circuit rendered in these proceedings, on March 21, 1980.

OPINIONS BELOW

The judgment of the Court of Appeals, unpublished, appears herein at Appendix A. The decision and judgment of the United States Tax Court, affirmed by the United

States Court of Appeals, Fifth Circuit, without opinion and unreported, appears herein at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals was entered March 21, 1980. (See Appendix A below) and this Petition for Certiorari is filed less than ninety days from that date. The jurisdiction of this Court is invoked under 28 USC sect. 1257(3).

QUESTIONS PRESENTED

Upon being served a Notice of Deficiency by the Interenal Revenue, Petitioner timely petitioned the United States Tax Court against the demands of the Internal Revenue, but was denied any relief or effective argument, thus raising the following questions:

1. Whether the Tax Court can summarily deny consideration of Petitioner's liability for the tax in question, and thus, in effect, deny Petitioner any defense against a Deficiency Notice from the Internal Revenue.

2. Whether the Tax Court can summarily and gratuitously inject false issues of merit and attribute them to Petitioner as such, when Petitioner made no such claim to such issues as meritorious. This question addresses particularly the false issue of constitutionality of the Income Tax, which Petitioner nowhere advanced in his Petition to the Tax Court. See Appendix C pages A-8 and A-10.

3. Whether the Court below, that is the Circuit Court of Appeals for the 5th Circuit, can reject Petitioner's appeal on the same irrelevant grounds advanced by the Tax Court as falsely addressing the merits, when Petitioner challenged only his liability for the tax under the circumstances relevant to the condition precedent necessary for the Internal Revenue Service to lay and collect such a tax as an excise in the first instance. See Appendix C at pages A-8 and A-10.

CONSTITUTIONAL PROVISION INVOLVED

Although the Tax Court otherwise wishes to make it appear so, there is

no constitutional issue involved as pleaded by Petitioner, except as the Tax Court itself contrived such issue in a reckless, careless, gratuitous and disingenuous reading of Petitioner's original Petition.

STATEMENT OF THE CASE

Petitioner, Allen G. Hicks, a veterinarian, timely petitioned the Tax Court for relief from a notice of deficiency laid by the Internal Revenue agaist Petitioner and wife Claudette.

Petitioner declined to enter into any bargaining over amount of deficiency in amounts due or not due on the grounds that Petitioner, for various reasons advanced, was not subject to operation of the tax in question, though completely in agreement with the constitutionality of its imposition upon those who were, for the necessary reasons, singled out as liable to file and pay.

After several filings of papers, the Tax Court found against Petitioners, but in so finding, burdened Petitioner's stand with a false claim of unconstitutionality

and precluded any defense by Petitioner to a refutation of the allegation. See Appendix C page A-3.

Appeal was taken to the Fifth Circuit, where Decision of the Tax Court was sustained without comment on May 21, 1979. See Appendix B.

REASONS WHY THE WRIT SHOULD BE GRANTED

As the record below shows in each instance, the Court of Appeals has lent its fiat to the declarative error of the Tax Court that the U.S. Income Tax is a direct tax and can thus be levied without consideration of the privilege exercise of which determines liability for the imposition of the tax.

The Court of Appeals has ratified the effect of the above error by misreadin from Petitioner's original Petition to the Tax Court the contention regarding the generic nature of the Income Tax, and thus introduced a false issue of constitutionality allegedly advanced by Petitioner, who made no such allegation.

The merits of the original Petition are clear. Petitioner therein asserted acquiescence to the full constitutionality of the Income Tax as an excise or indirect tax, asserting that the only unconstitutionality involved, would be to treat the tax in question as direct, with or without the 16th Amendment.

Clearly, this Court itself has decided and ruled time and again that the tax in question is an excise precisely as asserted by Petitioner throughout.

While it is granted that neither the judgment of both the Tax Court and the Court of Appeals rendered any direct decision on the question of direct tax or indirect excise, both courts, by misconstruing, misreading, misinterpreting and carelessly garbling the merits of the Petition, have done precisely what they have no leave to do, that is to decide a federal question of income tax liability in such a way as to conflict with all prior applicable decisions of this court and so find against Petitioners. Indeed, the both courts so far departed from the accepted and usual course of addressing the merits with care and deliberation that they have made a mockery of the efforts of any individual attempting to determine personal liablility under the tax laws.

So, too, did both courts speciously and spuriously interpret Petitioner's original address to the subject of bank

checks and liability upon their use. See Appendix C page A-10.

The Circuit Court of Appeals has thus so far sanctioned such a departure of the Tax Court from all reasonable and coherent address to the merits of a Petition as to call for the exercise of this Court's power of supervision and intervention to relieve Petitioner of injustice.

If these judgments are allowed to stand, courts will be constrained to address the Income Tax as a direct tax, contrary to the landmark decisions of this Court and to prejudice the rights of every individual appearing before it, whether subject to the operation of the tax or not.

The Court below has thus burdened every individual with the alleged enjoyment of a privilege unknown, unnoticed and undescribed anywhere in Title 26 USC, upon which the excise is levied under the guise of a direct tax, and so allowing them no choice of whether to exercise the true privilege or not, or

even to be aware of its existence.

Petitioner was denied, and future litigants will thus be denied plenary consideration of their defenses against the Internal Revenue Service, and whether or not they have a choice to avoid or not avoid the corporate or quasi-corporate privilege creating the liability.

CONCLUSION

PETITIONERS thus petition for writ of certiorari to 5th Circuit Court of Appeals and move for reversal and vacation of judgment of the Court of Appeals, Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3372

Summary Calendar*

ALLEN G. HICKS and CLAUDETTE HICKS,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

(MARCH 21, 1980)

Before HILL, GARZA and THOMAS A. CLARK,

Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

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* Fed. R. App. Proc. 34(a), 5th Cir. Local R.18.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2nd 966.

APPENDIX B

UNITED STATES TAX COURT

ALLEN G. HICKS and CLAUDETTE HICKS, Petitioners,	)	
v.	)	Docket No. 1795-77
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

DECISION

Pursuant to the opinion of the Court filed March 20, 1979, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax and additions to the tax due from the petitioner Allen G. Hicks as follows:

		Deficiency Additions to the Tax	
Year	Income Tax	$ 6651(a)	$ 6653(a)
1974	$5,404.37	$664.84	$270.22

That there are deficiencies in income tax and additions to the tax due from the petitioner Claudette Hicks as follows:

		Deficiency Additions to the Tax	
Year	Income Tax	$ 6651(a)	$ 6653(a)
1974	$4,361.57	$406.02	$218.09

Signed) Theodore Tannenwald, Jr.
Judge.

Entered: June 12, 1979

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3372

ALLEN G. HICKS and CLAUDETTE HICKS,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court correctly held that taxpayers, who relied solely on the claims that the income tax is unconstitutional and that checks are not includible in income, had failed to show that the Commissioner's deficiency determinations were incorrect.

STATEMENT OF THE CASE

This is an appeal from the decision of the United States Tax Court (Judge Tannenwald) upholding the Commissioner's determination of a deficiency of $5,404.37 in income tax plus additions to tax for 1974 due from Allen G. Hicks, and a deficiency of $4,361.57 plus additions to tax due from Claudette Hicks for 1974. (R. 285.[1/]) (sometimes referred to collectively as taxpayer). The Tax Court's Memorandum Findings of Fact and Opinion (R. 255-275), unofficially reported at P-H Memo T.C., par. 79,098, was filed March 20, 1979. Decision was entered June 12, 1979. (R. 285.) Taxpayers' notice of appeal was timely mailed on September 7, 1979, and therefore timely filed under Section 7502(a) of the Internal Revenue Code. This Court has jurisdiction pursuant to Section 7482(a) of the Internal Revenue Code.

1/ "R." references are to the original record as repaginated by the Clerk of the Tax Court.

The relevant facts, as found by the Tax Court[2/] (R. 256-262) may be summarized as follows:

Taxpayers are husband and wife. Allen Hicks is a veterinarian, doing business as a sole proprietorship. In 1974, Allen and Claudette each received taxable income of $16,075.18. A joint income tax return was prepared by William C. Glazener, a return preparer, and presented to taxpayer prior to April 15, 1975. Taxpayers did not file this form. (R. 257-259.)

On June 11, 1975, Allen filed a Form 1040 (Individual Income Tax Return) with the Internal Revenue Service. On July 13, 1977, he filed an amended Form 1040. Neither form contained any information other than his name, social security number, filing status, and claimed exemptions. On the form filed in 1975, "Objection: self-incrimination" was written in all spaces provided for

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2/ Pursuant to Rule 91(f) of the Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974), the Tax Court deemed certain facts stipulated after taxpayers refused to enter into a stipulation (R. 256.)

information on income, deductions, etc. On the form filed in 1977, various constitutional grounds were stated for the omission of information. Claudette did not file a return for 1974. (R. 250-260.)[3/]

Shortly after Allen's Form 1040 filed in 1975 was received by the Internal Revenue Service, he was notified that it was not a valid return. In late 1975, Internal Revenue Service agents interviewed Glazener, the return preparer, and, pursuant to a summons, obtained from him his records relating to taxpayers, inlcuding the 1974 return that Glazener had prepared. (R. 261.)

Based on these records, the Commissioner asserted deficiencies against taxpayers. The Commissioner also asserted deficiencies against taxpayers. The Commissioner also asserted a fraud penalty against Allen under Section 6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.) and additions to tax against Claudette for failure to file

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3/ Although Allen's form filed in 1977 stated he was filing a joint return, neither this form, nor the one filed in 1975 were signed by Claudette (R. 260.)

a return under Section 6651(a), and for underpayment of taxes resulting from negligent or intentional disregard of rules and regulations under Code Section 6653(a). Taxpayers filed a timely petition for redetermination in the Tax Court (R. 5.) In his answer in the Tax Court (R. 124125), the Commissioner contended that if Allen were not liable for the fraud penalty under Code Section 6653(b), then, in the alternative, he was subject to additions to tax for failure to file a return and for negligent underpayment of taxed under Code Sections 6651(a) and 6653(a), respectively. Taxpayers moved to dismiss, asserting in essence that the income tax was unconstitutional. After a hearing where taxpayers were given an opportunity to submit evidence regarding their tax liability, and their liability for additions to tax, the Tax Court held that taxpayers were liable for the deficiencies in income tax. The Tax Court also held that the Commissioner had filed to show that Allen's refusal to file was due to fraud, but held that the record

established that Allen was liable for the additions to tax for negligent underpayment and failure to file, as was Claudette. (R. 266-275.) Taxpayers bring this appeal.

SUMMARY OF ARGUMENT

Taxpayers, who appear here pro se, contend they had no income subject to tax. The Commissioner based his deficiency determinations prepared for them but which was not filed. Taxpayers, who had the burden of showing that the deficiencies were erroneous, have failed to submit any evidence challenging the deficiencies. Taxpayers, both in the Tax Court and in this Court claim that an income tax is not permitted by the United States Constitution. There is no foundation for such a claim, and this contention has been repeatedly rejected by the courts.

Taxpayers also seemingly contend that they are not required to include in their income any checks thay may have received. The Tax Court correctly rejected this argument. Income includes not only cash, but also other property. It is

well settled that checks received from a solvent drawer are includible in the income of a cash basis taxpayer when received. The Tax Court was thus correct in upholding the Commissioner's deficiency determinations and its decision should be affirmed on appeal.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT TAXPAYERS, WHO RELIED SOLELY ON CLAIMS THAT THE INCOME TAX IS UNCONSTITUTIONAL AND THAT CHECKS ARE NOT INCLUDIBLE IN INCOME, FAILED TO SHOW THAT THE COMMISSIONER'S DEFICIENCY DETERMINATIONS WHERE INCORRECT

Taxpayers in this case have not filed valid income tax returns for 1974, the taxable year in question. Instead taxpayers Allen Hicks submitted to the Internal Revenue Service a Form 1040 which disclosed no information from which the tax due from taxpayers could be computed. The Commissioner obtained from taxpayers' return preparer a copy of a return prepared by him for taxpayers, and other books and records of the taxpayers which were in the preparer's possession. Based on this information, the Commissioner determined

deficiencies in taxpayers' income taxes for 1974. Taxpayers offered no evidence in the Tax Court disputing the amount of the deficiencies, although they were specifically apprised by the Tax Court that they had the burden or proving that the deficiencies were erroneous. See Welch v. Helvering, 290 U.S. 111, 115 (1933); Rule 142(a), Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974). Taxpayers instead relied on a broad constitutional objection to the income tax and a claim that they need not include checks received by them in income.

In the Tax Court, taxpayers challenged the constitutionality of the income tax on a variety of grounds[4/], including a claim that it was not permitted under the Sixteenth Amendment of the Constitution of the United States, and that the Fifth Amendment protected them from providing any information on their tax forms. Although not clearly arti-

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4/ Taxpayers filed a document entitled "Trial Memorandum", (R. 170-178) which the Tax Court treated as a motion to dismiss (R. 179.)

culating such claim here, taxpayers nonetheless apparently continue to assert (BR. 3) that the Sixteenth Amendment does not permit an income tax. This contention is, of course, frivolous, and has been repeatedly rejected by the courts. Brushaber v. Union Pacific R. Co., 240 U.S. 1, 17-19 (1916); Melton v. Kurtz, 575 F. 2d 547, 548 (C.A. 5, 1978); Capp v. Commissioner, 65 T.C. 68, 84 (1975), aff'd without published opinion, 559 F. 2d 120 (C.A. 3, 1977).

The Tax Court also treated taxpayers as arguing that the receipt of checks by them for payment for services or goods was not taxable as income (R. 264-265), and, apparently, taxpayers also pursue this contention on appeal (Br. 2). As the Tax Court correctly noted (R. 264) the conceopt of "'income'" is not limited to the recipt of cash. Internal Revenue Code of 1954, Sec. 61(a). (26 U.S.C.). See, e.g., United States v. Phellis, 257 U.S. 156, 174-175 (1921); United States v. Wangrud, 533 F. 2d 495 (C.A. 9, 1976); United States v. Daly,

481 F. 2d 28, 30 (C.A. 8, 1973). See also, 2 Mertens, Law of Federal Income Taxation (Rev. 1974), § 11.01.

Taxpayers are on the cash receipts and disbursements method of accounting, and are required to include in income both cash and the fair market value of other valuable property actually or constructively received in the taxable year. There is no question that checks drawn on solvent accounts and received by taxpayers in 1974 were the equivalent of cash, and were includible in their 1974 taxable income. Lavery v. Commissioner, 158 F. 2d 859, 860 (C.A. 7.

Taxpayers have failed to offer any evidence disputing the Commissioner's determination of deficiencies. The Tax Court was thus correct in upholding those deficiencies. Welch v. Helvering, spura.

The Tax Court also concluded that both Allen and Claudette were liable for additions to tax under Section 6653(a) of the Internal Revenue Code of 1954 (26 U.S.C.) for underpayments of tax resulting from negligent or intentional disregard of rules and regulations, and under 1954 Code Section 6651(a) (26 U.S.C.)

for failure to file a return. Neither here, nor in the Tax Court, have taxpayers contested these additions. In any event, the Tax Court's determinations are fully supported by the record.

It is plain from the record that taxpayers were aware of the requirement that they file returns, as shown by their previous filings, and the preparation for them by their return preparer of the 1974 return which was never filed. Moreover, the arguments railed by taxpayers as supposed justification for their failure to file any returns or pay the taxes due are wholly frivolous and do not negate a conclusion that their underpayment of tax was due to an intentional disregard of rules and regulations. The Tax Court was thus well justified in sustaining the additions to tax under Code Section 6653(a).

Similarly, the record plainly supports the correctness of the additions to tax under Code Section 6651(a) for failure to file a return. Claudette filed no return for 1974. Allen filed a Form 1040 con-

containing no information from which his income could be computed, but claimed Fifth Amendment privilege. It is settled that the privilege against self-incrimination does not permit to refuse to make a return at all, United States v. Sullivan, 274 U.S. 259, 263 (1927), and a return which does not supply information from which the tax liability may be computed is not return at all for purposes of the filing requirements. It is well settled that such a filing does not constitute a valid return. United States v. Johnson, 577 F. 2nd 1304, 1310-1311 (C.A. 5, 1978). Taxpayers have offered no evidence to show that the failure to file a return was due to excusable neglect.

CONCLUSION

For the reasons set forth above, the decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1979.

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing petition has been made on respondents, on this 16 day of June, 1980, by mailing one copy thereof in an envelope, with postage prepaid, properly addressed to them as follows:

Mr. M. Carr Ferguson
Tax Division
United States Department of Justice
Washington, D.C. 20530

Allen G. Hicks
Litigant Pro. Se.